



**COMMONWEALTH OF MASSACHUSETTS**  
**Board of Registration**  
**of**  
**Hazardous Waste Site Cleanup**  
**Professionals**

ONE WINTER STREET, 3rd Floor  
BOSTON, MA 02108  
PHONE: 617-556-1091 FAX: 617-292-5872

**PROFESSIONAL CONDUCT COMMITTEE**

**Minutes of Meeting on March 27, 2008**

Approved on June 5, 2008

**Prepared by:** Lynn Peterson Read

**Meeting Location:** JSI Center for Environmental Health Studies, 44 Farnsworth Street, Boston, Mass.

- 1. Call to Order:** Robert Luhrs called the meeting to order at 10:37 a.m. Also present were Deborah Farnsworth, Kirk Franklin, Gretchen Latowsky, and Kelley Race. Janine Commerford and Christophe Henry arrived at 11:38 a.m., and Gail Batchelder arrived at 11:50 a.m. Committee members absent: Paul Mullen, Debbie Phillips, and Debra Stake. Staff members present were Allan Fierce, Terry Wood, Brian Quinlan, Allen Wyman, Lynn Read, and Ron Viola.
- 2. Announcements:** Mr. Fierce announced that the *Salem News* published an article about the agreement for discipline between the Board and Richard Warren, Complaint No. 02C-04. A copy of the article was included in the packet of materials sent to the Board members for this meeting.

Ms. Wood distributed updated disciplinary statistics. She noted that the number of active disciplinary investigations was declining due to recent case dispositions, and that additional cases were on the agenda for today's Quasi-Judicial session. Ms. Wood also noted that, in Complaint No. 06C-03, Respondent appears likely to appeal, at which point the case would move to the Adjudicatory Proceedings list.

- 3. Previous Minutes:** The draft minutes of the meeting held on February 12, 2008, were approved.

#### **4. Old Business**

##### **A. Status of CRTs**

At Mr. Luhrs's request, the chair of each CRT reported on progress made during the last month. During the discussion, Mr. Fierce noted that the LSP in case number 06C-04 has retired from practice while the Complaint is pending, but the CRT has not begun active investigation. This circumstance presents a question of how best to utilize Board resources in conducting the investigation. The CRT has not yet been able to convene to address this issue, and thus Mr. Fierce wished to postpone comment to the Committee until the CRT could meet and recommend a procedure in case number 06C-04. The Committee tabled the matter pending the CRT's recommendation.

##### **B. Website Subcommittee**

Ms. Commerford stated that the subcommittee has not met. Mr. Wyman noted that Ron Viola has been working on the Board's self-imposed goal to improve the design and appearance of the site. Mr. Viola announced that the Board Staff has received certification from the Commonwealth's Chief Information Officer at the Information Technology Division that its website is in compliance with the state's "web accessibility enforcement program."

##### **C. Division of Administrative Law Appeals (DALA)**

Mr. Fierce stated there was nothing new to report. The Board has not yet received the decision that DALA's Chief Magistrate Taylor assured Ms. Commerford in early February was ready and would issue shortly.

##### **D. Draft Appointment of Presiding Officer for Appeal**

Mr. Fierce presented a draft of "Appointment of Presiding Officer and Instructions for Conducting Adjudicatory Proceeding." The draft Appointment codifies the Board's decision on February 12, 2008, to authorize a hearing officer from DEP's Office of Appeals and Dispute Resolution (OADR) to hear one Board appeal as a pilot. Ms. Wood expects the next appeal imminently; the Board issued an Order to Show Cause in Complaint No. 06C-03 on March 6, 2008. The 21-day answer period ends March 28, 2008.

The draft Appointment responds to OADR's request that the Board provide a memo that bars *ex parte* communications between OADR and Board members and staff. It also requests that OADR apply the timelines in Board Policy 2007-1 to the appeal. Sal Giorlandino, Acting Chief Presiding Officer of OADR, told Mr. Fierce that OADR would try to observe the timelines.

Mr. Fierce pointed out that the memo does not specify that the hearing officer will conduct a "pre-screening" conference of the type OADR customarily uses to focus the issues and determine the amenability of the case to an agreement before time and effort are invested in the appeal. After discussion, the Committee asked Mr. Fierce to amend the Appointment to refer to the hearing as a pilot, and inform the hearing officer of the Committee's intention that the pilot case should include a pre-screening process.

The draft Appointment identifies Laurel MacKay as the hearing officer for the appeal of the Board decision because Mr. Giorlandino had informed Mr. Fierce that OADR would assign her to the Board's appeal due to her experience applying G.L. c. 21E and the MCP. Mr. Luhrs asked whether it is advisable for the Board's Assignment to specify a hearing officer, or whether it should simply authorize OADR to assign one of its hearing officers to conduct the appeal, thereby giving OADR discretion to assign a different hearing officer if Ms. MacKay cannot serve. The Committee members present discussed the possibility of having two Board members sit on a panel with the OADR hearing officer, if that hearing officer did not have experience applying the MCP, and again rejected that option. The Committee also considered having specific Board members "on call" to answer technical questions from a single OADR hearing officer. This was rejected out of a concern that it could constitute an improper *ex parte* communication. Ms. Commerford read to the Committee a related question from Ms. MacKay: do the Board's regulations authorize the hearing officer to issue an order of reference delegating specific technical issues to a designated fact finder? Ms. Commerford read aloud from DEP's regulations on adjudicatory proceedings, which include such a provision. Ms. Wood and Mr. Fierce advised that the Board's regulations incorporate the Standard Rules of Adjudicatory Practice and Procedure, and neither the Board's regulations nor the Standard Rules provide an order of reference to a designated fact finder. Ms. Wood noted that in an appeal, both parties present expert testimony on technical issues, which provides guidance for the rulings of the hearing officer.

The Committee members present voted unanimously not to approve the draft Appointment as written. They advised the staff that the Appointment should authorize OADR to conduct the hearing as a pilot, with a single, unspecified hearing officer, and Mr. Fierce should inform the hearing officer of the Committee's intention to incorporate OADR's pre-screening process into the Board's pilot appeal.

## 5. New Business

**A. New Complaint No. 07C-08**

The Committee reviewed a redacted copy of the Complaint and a redacted copy of the LSP's Response. The Complaint was filed by MassDEP and alleges, among other things, that the LSP had reviewed and misrepresented conclusions made by others as to risk in a DPS Submittal to provide an Opinion that directly contradicted supporting documentation; filed Class C RAOs without completing either a DPS Submittal or a Phase II Comprehensive Site Assessment; and filed a Class A-3 RAO and AUL without having collected post-excavation or post-remediation samples. After discussion of the Complaint and the Response by the LSP, a motion was made and seconded to appoint a CRT. The motion passed unanimously. The Committee members tabled the appointment of CRT members until after the meeting of the Quasi-Judicial session of the Board later today.

- 6. Future Meetings:** The Committee will meet next on April 30, 2008, at the MassDEP Southeast Regional Office in Lakeville. The Committee will also meet on June 5, 2008, tentatively at Weston & Sampson in Peabody.
- 7. Adjournment:** The meeting was adjourned at approximately 12:31 p.m.